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# Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 53.

LA REPUBLIQUE FRANCAISE and LA COMPAGNIE FERMIERE DE L'ETABLISSEMENT THERMAL DE VICHY,
Petitioners,

vs.

THE SARATOGA VICHY SPRING COMPANY,
Respondent.

## PETITION FOR REHEARING.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now come La Republique Francaise and La Compagnie Fermiere de L'Etablissement Thermal de Vichy, the petitioners in this cause, and respectfully present their petition for rehearing, and submit the following reasons why their prayer should be granted:

I. This was a suit in equity instituted by the French Republic and the Vichy Company, owner and lessee, respectively, of the Vichy Springs in France, to re-

strain the use by The Saratoga Vichy Spring Company of the designation "Vichy" as a name of a water not drawn from the Vichy Springs.

The Court held in substance that when the defendant entered the market your petitioners had acquired "an exclusive right to the use of the word 'Vichy' as against" the defendant, but that by reason of delay in instituting suit this right could not be enforced.

II. The principal questions presented and considered were (**1**) whether the French Republic could invoke the same rule as the United States, to wit, that laches is not imputable to the neglect of a government to pursue trespasses upon its rights and (**2**) whether the rule laid down in earlier decisions of this Court that in a case of this character delay in seeking relief defeats the right to an accounting, but does not defeat the right to an injunction against the continuing wrong, is applicable to this cause.

III. The Court expressly left the first question "open to doubt," and in so doing, as we respectfully venture to think, overlooked and inadvertently overruled the decision of this Court in the case of United States vs. Insley (130 U. S., 263, 265), which expressly and necessarily repudiates and displaces the doctrine that where the Government is suing for the prosecution of a private and proprietary right, laches is imputable to it, by the enunciation of which doctrine alone any decision upon the rights of the French Republic in the present case was avoided. Other decisions of this Court not less plainly indicate that in the case of a republic (as distinguished from a sovereignty represented by an individual capable of owning private property as such) the question whether property or a

right therein is governmental depends solely upon whether it is owned by the Government (San Pedro, &c., Co. vs. United States, 146 U. S., 120; Van Brocklin vs. State of Tennessee, 117 U. S., 151, 158; United States vs. Nashville Railway Co., 118 U. S., 120).

The Court, in its opinion, says: "If the Republic be a necessary party to the suit here, as it sues in its private and proprietary capacity, the defense of laches is available against it. * * * If it be an unnecessary party, the defense of laches may certainly be set up against the Vichy Company." Because, as found by the Court, "the title of the French Republic to the springs of Vichy is clearly established," the French Republic is a necessary party to the suit.

A decree could not be entered in favor of the Vichy Company alone, because it has no property or right in the name whatever. The owner of the springs is necessarily the only person entitled to the exclusive use of the name (if any one is), because the name denoting origin cannot be separated from the source of origin. The Vichy Company, for example, has no more right than the defendant to use the name upon waters not drawn from the springs at Vichy. That a decree could not be entered in favor of the Vichy Company alone has been in substance directly determined in cases presenting analogous circumstances (Krauss vs. Peebles, 58 Fed., 585, 591; *In re* Apollinaris Co., 1891, 2 Ch., 213; 8 R. P. C., 154; see also Moxie Co. vs. Baumbach, 32 Fed., 205).

On the other hand, it is certain that it is impossible to enter a decree determining that the word "Vichy" may or may not be used upon waters not drawn from the Vichy Springs without vitally affecting the interests of the owner of those springs. It is a fundamental

principle of justice as well as the rule in equity that all persons "interested in the object of a suit and whose rights will be directly affected by the decree must be made parties to the suit" (McArthur vs. Scott, 113 U. S., 341, 391-2; Shields vs. Barrow, 17 How., 130).

The French government is, therefore, a necessary party and, in so far as the injunction is concerned, the only necessary party to the suit. It is suing to enforce its own rights and to protect its own property—part of its public domain—for its own benefit.

This is plainly demonstrated by the situation which confronts it to-day. It cannot come into Court when the lease of the springs to the Vichy Company expires and seek then to assert the rights which the Court expressly left "open to doubt," because it will be met by the plea of *res judicata*.

The decree in this suit, to which the French Republic is a party, by denying the rights which the complainant seeks to assert denies them forever and destroys, *pro tanto*, the value of the property of the French Republic.

If it be true that the Court has overlooked the decisions holding that all property owned by the Government is governmental and not susceptible of being lost by laches, then the Court has inadvertently decided against the rights which the French Republic sought to assert, at the same time in effect denying the French Republic its day in Court by leaving a question of controlling importance in the case "open to doubt."

It was recently said by this Honorable Court: "As a foreign government has seen fit to submit its case to the Court of the country with whose citizens its con-

troversy exists, it would be unfortunate if through any mistake it was prevented from carrying questions of law to the Court of last resort" (Columbia vs. Cauca Co., 190 U. S., 524, 525).

It would be equally unfortunate if by an oversight a question has been left unanswered which is directly presented and if resolved in favor of the foreign government entitles it to the relief it seeks. It is, therefore, most humbly submitted that if the Court has overlooked the decisions to the effect that laches is not imputable to the Government of the United States when suing to assert its proprietary rights, a re-argument should be granted to the end that the question whether the French Republic may invoke the same rule may be fully presented and the alleged rights of the French Republic may not become *res judicata* without a full hearing and direct decision.

IV. In dealing with the other question, whether in a case of this character laches defeats the injunction against the continuing wrong as well as the accounting, the Court intimates that the defense of laches is not available in a case of actual fraud, and finding in the defendant's labels little evidence of a fraudulent intent decides by the result alone, that the laches defeats the injunction as well as the accounting.

We very respectfully venture to suggest that if by reason of the exceptional circumstances to which we have alluded, a rehearing is granted, this question may also be considered, and respectfully urge the following reasons in support of this suggestion:

The rule that the defense of laches would not be available in a case of actual fraud (illustrated by McIntyre vs. Pryor, 173 U. S., 38), which alone the Court considered may not be applicable to the present

case without affecting the petitioners' right to injunctive relief. That doctrine, it is respectfully submitted, is not the doctrine on which McLean vs. Fleming, 96 U. S., 245; Menendez vs. Holt, 128 U. S., 516, and other like cases rest, and is not the doctrine which your petitioners sought to invoke. In all these cases the question has not been whether the defense of laches is available. Laches was available in McLean vs. Fleming and Menendez vs. Holt, and its penalty imposed by defeating the accounting. In the present case laches is available and the same penalty should be imposed. And since the Vichy Company, and not the French Republic, would be entitled to profits, it is plain that there can be no question but that by reason of laches profits are not recoverable. But the question remains whether laches defeats also the remedy against future injury from the continuing wrong. It is respectfully submitted that the reasoning of the cases of McLean vs. Fleming and Menendez vs. Holt rests in no degree upon the mental attitude of the defendant, but rests solely upon the nature of the right involved and of the wrong.

In that portion of its opinion in this case numbered I, the Court in substance decides that at the time the defendant entered the market the owner of the Vichy Springs had an exclusive right to the use of the word "Vichy" as against the defendant. From this premise, we respectfully submit, the conclusion inevitably follows that the defendant's use of the word when it began was unlawful and that there was in this case identically the same fraud as appeared in the case of Menendez vs. Holt, wherein the defendant used the name clearly distinguished by accessories and in an honest, though mistaken, belief that he owned the

right to use it, and wherein the rule which your petitioners sought to invoke was reaffirmed and expounded.

The question whether laches defeats the right to relief against future injury from the continuing wrong in cases of this character is very different from the question whether the fraud of the defendant has been so unconscionable that he will not be allowed to invoke the defense of laches at all. The former question, which is of controlling importance in this case, has been decided (if at all) only tacitly and by the result.

Your petitioners, therefore, respectfully pray that this cause be restored to the docket and a reargument be ordered as to the questions whether the French Republic may invoke the same rule as to laches as could be invoked by the United States if the United States were the complainant—upon which no opinion was expressed by the Court, and as to whether the rule in this class of cases that laches is applicable and defeats the right to an accounting but does not defeat the right to an injunction against future injury from the continuing wrong is still law, which was decided by the result alone without any expression of opinion or any indication that it was considered.

The undersigned members of the Bar of this Honorable Court, after carefully examining the opinion of the Court in this cause, humbly conceive that this cause is one which may properly be reheard by this Court, if this Court shall see fit so to order, and they therefore respectfully certify accordingly.

New York, January 21, 1904.

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Counsel for Petitioners.